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In the Supreme Court of the United States

OCTOBER TERM, 1984

MAXWELL S. COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor, during his cross-examination of petitioner and during his rebuttal closing argument, improperly commented upon petitioner's silence following his receipt of *Miranda* warnings[1] in violation of *United States* v. *Hale*, 422 U.S. 171 (1975), and *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to manufacture and distribute a controlled substance, methamphetamine, in violation of 21 U.S.C. 846, one count of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1), and three counts of using a telephone in furtherance of the conspiracy, in violation of 21 U.S.C. 843(b). Petitioner was

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[1]See *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

sentenced to a five-year term of imprisonment on the conspiracy count. On the four remaining counts, he was sentenced to concurrent three-year terms of imprisonment, to run concurrently with the five-year term that he received on the conspiracy count. He was also sentenced to a three-year special parole term to commence upon his release from confinement on the conspiracy count. The court of appeals affirmed (Pet. App. A1).

a. The evidence adduced at trial, the sufficiency of which is not in dispute, established that on March 11, 1983, petitioner was introduced to Don Weathermon, an undercover agent of the Federal Bureau of Investigation, in Jacksonville, Florida, by Adrian Briscoe, a confidential source for Agent Weathermon who had met Cobb several months beforehand (3 R. 67-68; 5 R. 272).[2] During the course of a lunchtime conversation, Briscoe asked Agent Weathermon whether he knew anyone who was interested in purchasing methamphetamine (3 R. 74). After Agent Weathermon replied that he might know someone in Atlanta who would be interested, petitioner offered to obtain some methamphetamine for Agent Weathermon (3 R. 75). Later that day, after telephoning and meeting with his contact, petitioner gave Agent Weathermon a sample of one gram of methamphetamine and offered to sell Agent Weathermon 14-15 pounds of methamphetamine in one-pound units (3 R. 51-52, 76-90). Agent Weathermon agreed to contact petitioner if he was interested in future sales (3 R. 90).[3]

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[2]The statement of facts is taken from the government's brief in the court of appeals.

[3]Agent Weathermon recorded all of his meetings and some of his telephone conversations with petitioner, and substantial portions of these tape recordings were played for the jury at petitioner's trial. See Gov't C.A. Br. 7 & n.4.

On March 17, Agent Weathermon telephoned petitioner to say that he was interested in purchasing methamphetamine, and he and petitioner agreed to pursue the matter further (3 R. 91-92). One week later, Agent Weathermon introduced petitioner to his contact in Atlanta, who was in reality Douglas Driver, an undercover agent for the Drug Enforcement Administration (3 R. 93-94). During their meeting, petitioner and Agent Driver discussed the sale of 5-10 pounds of methamphetamine at $8,000 per pound every two weeks (5 R. 329-330).

On April 6, petitioner asked Michael Hamm, a former employee of petitioner's, to locate a supply of P2P, a principal component of methamphetamine, and to sell some methamphetamine for him (5 R. 247-249). However, Hamm refused to become involved with petitioner, and, later that day, he informed the FBI of petitioner's request (5 R. 250-251). At a meeting on April 12, petitioner told Agent Weathermon that his "chemist" had been forced to dispose of 5-6 pounds of methamphetamine during the past week, because of heightened law enforcement activities in Jacksonville during that period, and that he was having difficulty obtaining P2P (3 R. 106; 4 R. 119; 5 R. 332-333). Petitioner reiterated his difficulties in obtaining P2P at several other meetings that he had with Agents Weathermon and Driver on May 20, June 10, and July 14 (4 R. 123-124; 5 R. 336-341). At the May 20 meeting, for instance, petitioner told Agent Weathermon that he had failed to locate any P2P and asked Weathermon to try to do so (4 R. 123-124). Three weeks later, still without a supply of P2P, petitioner informed Agent Driver that petitioner's chemist would himself attempt to synthesize the P2P (5 R. 336-337), and he later asked Agent Driver for detailed written instructions on its manufacture (5 R. 340). Petitioner and the undercover agents had no further contact after July 14 (5 R. 339, 341), and petitioner was arrested on December 1, 1983 (6 R. 481-482).

b. At trial, petitioner, who claimed to have been in poor financial condition at the time of the events in question, maintained that he had been entrapped, and he testified in his own defense (5 R. 399-426). He testified that, before the incidents alleged in the indictment took place, he had dismissed a former colleague named Jerry Pendergrass after discovering that Pendergrass was involved in the production of methamphetamine (5 R. 419-420). He later met Agent Weathermon through Adrian Briscoe, who told him that Agent Weathermon was looking to employ someone to salvage electrical transformers, but was also interested in purchasing some methamphetamine (5 R. 427-429). Briscoe, according to petitioner, encouraged petitioner to "go along" with Agent Weathermon if he asked petitioner to obtain some methamphetamine for him, so that they could secure the salvage job (5 R. 430). At the lunchtime meeting on March 11, according to petitioner, Agent Weathermon prodded petitioner to furnish him with a small sample of the drug, and petitioner did so simply to obtain Weathermon's business (5 R. 431-434). Petitioner also claimed that he never intended actually to supply the undercover agents with additional quantities of the drug, but felt that he had to "put on a front for these people" in order to secure the salvage job (5 R. 456; see also 5 R. 438-440).

At the outset of cross-examination, the prosecutor sought to impeach petitioner's defense by showing that he was not in dire financial straits at the time of the scheme (5 R. 457-464). After pursuing that line of inquiry, the prosecutor then asked petitioner whether his testimony on direct examination was the first time that he had brought his story about Pendergrass to the attention of the FBI or any other law enforcement authority (5 R. 464), to which petitioner

answered affirmatively (*ibid.*).[4] Petitioner's counsel objected and, out of the jury's presence, moved for a mistrial, contending that the question amounted to an improper comment on petitioner's post-arrest silence (5 R. 464-465). The district court, relying upon *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), and *United States* v. *Riola*, 694 F.2d 670 (11th Cir.), cert. denied, 460 U.S. 1073 (1983), denied the motion (5 R. 478). Viewing the government's questions in context, the court reasoned that because the "jury is aware in this case that there was one individual [*i.e.*, Hamm] who was approached concerning drugs who did go to the FBI," the jury "would logically take the Government's question to mean pre-arrest silence, especially because of the defendant's defense of entrapment, and Dennis Hamm's testimony" (5 R. 477; see 5 R. 474-477). However, the court suggested that the government's cross-examination "could be more artfully presented, so that there [would be] absolutely no question that the Government was talking about [the period] before [petitioner's] arrest" (5 R. 477). The court thus instructed the prosecutor to "rephrase the question and be very specific as to the time you're talking about" (5 R. 478). The court also ordered the government to take similar care during closing argument (*ibid.*).

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[4]The questions were as follows (5 R. 464):

> Q Now, Mr. Cobb, the first time that you have in fact informed the FBI, because of its presence in the courtroom, or any other law enforcement person, about the existence of Mr. Pendergrass yourself, is in fact today; isn't that right?
>
> A That's true.
>
> Q And this is the first occasion, in fact, that you have given this particular detailed story to law enforcement authorities is today in this courtroom?

Defense counsel objected before petitioner could answer the second question (5 R. 464).

In accordance with the district court's instructions, the prosecutor continued his cross-examination of petitioner by asking him whether he had "heard Mr. Hamm say yesterday that he went to the [FBI] the same night that he talked to you about this matter" (6 R. 481). Petitioner answered that he had and then admitted, following the prosecutor's next question, that he "had all the way up to December 1, the time of [his] arrest, to go to the [FBI] on the same matter, and yet [he] didn't" (6 R. 481-482). During rebuttal closing argument, the prosecutor observed that Hamm, upon being invited by petitioner to join the conspiracy to manufacture methamphetamine, instead went immediately "to the FBI. And isn't that what any citizen truly concerned about not being involved in something like this, would do?" (7 R. 584).

c. The court of appeals affirmed petitioner's convictions without opinion in a summary affirmance order. Pet. App. A1.

2. The summary affirmance order of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Petitioner maintains that the prosecutor, during his cross-examination of petitioner and again during his summation to the jury, improperly commented upon petitioner's silence following his receipt of *Miranda* warnings in violation of *United States* v. *Hale, supra*, and *Doyle* v. *Ohio, supra*.[5] That claim lacks merit.

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[5]At several points, petitioner phrases his argument in terms of the prosecutor's alleged references to his silence following his *arrest*. Pet. 13, 14. However, it is clear that an arrest, by itself, is insufficient to trigger the rule adopted in *Hale* and *Doyle*. See *Fletcher* v. *Weir*, 455 U.S. 603, 605-607 (1982). Rather, it is the administration of *Miranda* warnings that alone gives rise to a claim that a prosecutor has improperly referred to a defendant's out-of-court silence. See *ibid.*; see also

In *Hale* and *Doyle*, the Court held that the government may not use a suspect's silence following his receipt of *Miranda* warnings as proof of his guilt. 422 U.S. at 176-181; 426 U.S. at 617-620. A suspect's silence in those circumstances, the Court explained, is insolubly ambiguous, because it is as likely that he remained silent because he had been advised that he was entitled to do so as it is that he remained silent because his only response would have incriminated him. *Hale*, 422 U.S. at 176-177; *Doyle*, 426 U.S. at 617. Furthermore, because *Miranda* warnings implicitly assure a suspect that he will not be penalized for exercising his right to remain silent, it is fundamentally unfair, the Court reasoned, to allow the government to use a suspect's silence to incriminate him. *Doyle*, 426 U.S. at 618. At the same time, however, the Court has made it clear that the government may use a suspect's silence *prior* to his receipt of *Miranda* warnings as proof of his guilt. *Fletcher* v. *Weir*, 455 U.S. 603, 605-606 (1982); *Jenkins* v. *Anderson*, 447 U.S. at 235-241; see also *Anderson* v. *Charles*, 447 U.S. 404, 407-408 (1980). As the Court explained in those cases, because it is the administration of *Miranda* warnings that gives rise to both the ambiguous nature of a suspect's ensuing silence and the unfairness attendant upon using that silence to prove his guilt, the government is not barred from using a suspect's silence where he has not received *Miranda* warnings. *Fletcher*, 455 U.S. at 605-606; *Jenkins*, 447 U.S. at 235-241.

This case clearly falls on the *Fletcher-Jenkins* side of the line. In its case-in-chief, the government showed that petitioner was a willing participant in the conspiracy to manufacture and distribute methamphetamine and that petitioner's former employee, Hamm, unlike petitioner, immediately

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Anderson v. *Charles*, 447 U.S. 404, 407-408 (1980); *Jenkins* v. *Anderson*, 447 U.S. at 239-240.

told the FBI of petitioner's scheme after petitioner had asked him to become involved. In his defense, petitioner contended that he had been coerced into joining the scheme, and he testified that the only reason that he had done so was to convince Agent Weathermon to hire him for the salvage job that he needed. On cross-examination, the government, after attempting to show that petitioner was not in financial trouble during the conspiracy, sought to impeach petitioner's sincerity by pointing out his failure to bring the scheme to the FBI's attention prior to his testimony at trial. In this context, as the district court found (5 R. 477), the jury would naturally have concluded that the prosecutor's questions referred to petitioner's failure during the conspiracy to bring his predicament to the attention of the FBI. Moreover, the prosecutor made that point clear during his follow-up questioning and closing argument by expressly comparing petitioner's silence with Hamm's decision to contact the FBI, which had occurred months before petitioner was arrested and given *Miranda* warnings.[6] The

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[6]Petitioner's claim (Pet. 12-13) that the prosecution failed precisely to identify the time to which his questions referred ignores both the prosecutor's follow-up questions, which expressly referred to the period prior to petitioner's arrest, as well as the factual context in which the earlier questions were asked.

Petitioner also argues (Pet. 16-17) that the district court erroneously relied upon *United States* v. *Riola, supra*. However, *Riola*, as the district court recognized (6 R. 477), is virtually identical to this case. See 694 F.2d at 673. In any event, any conflict between this case and *Riola* is for the Eleventh Circuit, not this Court, to resolve.

district court thus correctly denied petitioner's motion for a mistrial.[7] Accordingly, because the court of appeals' summary affirmance of the district court's ruling is fully consistent with *Fletcher* and *Jenkins*, review by this Court of petitioner's fact-bound claim is unwarranted.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[7]Petitioner also erroneously argues (Pet. 11, 17-18) that he prosecutor improperly referred during his rebuttal closing argum nt to petitioner's silence. As noted above (page 6), the prosecutor simply compared petitioner's inaction prior to his arrest with Hamm's decision immediately to report petitioner's scheme to the FBI. Doing so was fully consistent with *Fletcher* and *Jenkins*. In addition, to the extent that petitioner objects (Pet. 11) to the prosecutor's comparison of his testimony at trial with his earlier willingness, evident on tape recordings played for the jury (see page 2 note 3, *supra*), to participate in the drug manufacturing scheme, the prosecutor's closing argument had nothing at all to do with petitioner's silence and was entirely appropriate. See, *e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (closing argument may address relevant issues raised during trial).

[8]Moreover, given the clear proof of petitioner's guilt, any error would have been harmless. See generally *United States* v. *Hasting*, 461 U.S. 499 (1983).